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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. GARY JOSEPH CROSS, Defendant and Appellant.	C087767 (Super. Ct. Nos. 16F5140 & 17F2259)

After defendant Gary Joseph Cross filed a motion to withdraw his no contest plea, the trial court denied the motion and sentenced him to state prison. He now contends the court abused its discretion by denying the motion. In the alternative, he seeks remand for the court to determine whether he should be granted mental health "pretrial diversion" under Penal Code section 1001.36.[1]

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[1] Undesignated statutory references are to the Penal Code.

We conclude the trial court did not abuse its discretion by denying defendant's motion to withdraw his plea, and defendant is not entitled to relief under section 1001.36. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 21, 2016, an information was filed in case No. 16F5140 charging defendant with theft of a vehicle with a prior vehicle theft (Veh. Code, § 10851, subd. (a)/Pen. Code, § 666.5—count 1), receiving a stolen vehicle with a prior vehicle theft (§§ 496d, subd. (a)/666.5—count 2), and misdemeanor possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)—count 3). As to counts 1 and 2, the information alleged that defendant had previously been convicted of unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), a serious or violent felony (§ 1170.12), and had four prior prison terms (§ 667.5, subd. (b)).

On December 19, 2016, defendant pleaded no contest to count 1 and admitted the prior serious felony and one prison prior, in return for a stipulated state prison term of five years.[2]

On April 25, 2017, a felony complaint was filed in case No. 17F2259 charging defendant with unauthorized use of personal information to obtain credit (§ 530.5) and alleging a prior strike conviction and three prison priors. On May 23, 2017, defendant

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[2] The only factual basis for the plea in the record is the trial court's recital of what defendant pleaded to and defendant's affirmative responses. As to count 1, the court stated that according to the information, on or about August 6, 2016, defendant willfully and unlawfully drove or took a 1994 Nissan pickup truck belonging to J.V. without his consent and with the intent to permanently or temporarily deprive him of title to or possession of the vehicle; at that time defendant had a conviction for a prior offense of the same character. As to the remaining allegations, defendant had a prior conviction for arson of property of another, a strike, occurring on or about December 8, 2000, and a prior conviction for unauthorized use of personal identification to obtain credit on or about March 10, 2015, and failed to remain free of prison custody for five years thereafter.

pleaded no contest to misdemeanor identity theft in return for dismissal of the balance of the charging document and a concurrent term.

On July 9, 2018, defendant filed a motion to withdraw his plea in case No. 16F5140. On July 16, 2018, the trial court denied the motion and imposed the stipulated sentences in both cases.

DISCUSSION

1.0 Denial of Motion to Withdraw Plea

Defendant contends the trial court should have granted his motion to withdraw his plea because the motion sufficiently alleged that his plea—entered on December 19, 2016—was not knowing, voluntary, and intelligent due to the effects of illness, mental health problems, and medications he was taking. We disagree.

1.1 *Background*

1.1.1 *The Motion*

Defendant's motion asserted the following "factual background," supported by attached exhibits:

After entry of his plea in case No. 16F5140, on February 16, 2017, defendant received a one-month continuance of sentencing "due to a desire to pursue inpatient treatment, and also based on his father's health issues." He received a further one-month continuance to complete a drug treatment program.

On April 24, 2017, defendant was the subject of a newspaper article that described his "lifestyle changes, including completing outpatient drug treatment and maintaining his sobriety." The next day, he was charged in case No. 17F2259.

On May 17, 2017, shortly before he entered a misdemeanor plea in his second case, he saw Walter Fletscher, M.D., because he anticipated extensive dental work before his incarceration and because he felt shortness of breath and chest discomfort. On May 19, 2017, Dr. Fletscher wrote a letter indicating that defendant's testing was abnormal and suggested coronary artery disease.

On May 23, 2017, when defendant entered his misdemeanor plea in the second case, he advised the trial court he might need to have his sternum cut open, requiring a longer recovery time. On May 25, 2017, he had an appointment for cardiac catheterization, a procedure to check for arterial blockages. On June 12, 2017, Dr. Fletscher wrote that a treatment plan was being devised, but more time would be needed to complete testing and evaluation.

On July 25, 2017, defendant did not appear for sentencing because he had been taken into custody and transported to San Diego on a warrant. On July 31, 2017, the Shasta County Public Defender's Office received documents indicating defendant had an appointment on August 2, 2017.

On August 7, 2017, Dr. Fletscher wrote a letter stating defendant had an issue with his right coronary artery originating from the left coronary artery, and a surgeon had opined defendant needed surgery as soon as possible.

On September 22, 2017, defendant appeared in court, but had severe medical issues related to his open-heart surgery; he needed to leave court to lie down. His case was reset for an October plea date.

On October 24, 2017, defendant appeared in court, but was still very ill. He had two upcoming appointments with cardiologists.

On November 22, 2017, defendant underwent a clinical assessment at Tehama County Health Services Agency, during which he reported a lifelong history of physical abuse, neglect, sexual abuse, and domestic violence. At age six he was diagnosed with ADHD and given a prescription for medication and had taken psychiatric medications on and off since then. According to his wife, he constantly felt on edge and unable to sit still or concentrate, had regular nightmares, and suffered from irritability, outbursts of anger, uncontrollable worries and fears, emotional reactivity and poor impulse control, and depression. He had difficulty making decisions and relied on his wife for help with paperwork and remembering details because he felt his mind was " 'always going' " and

he could not remember anything. All of his psychiatric symptoms had intensified since his recent surgery.

On December 5, 2017, defendant requested a four-month continuance for further surgery.

On January 2, 2018, Gateway Medical Center gave defendant a list of his current medications, including several that have "mental side effects." This list included Albuterol, lithium carbonate, Ranitidine, Ambien, Hydroxyzine, Duloxetine, Dantrolene Sodium, Baclofen, Gabapentin, Oxycodone, Ibuprofen, "[n]icotine patch," Atorvastatin, Lisinopril, and "Bayer."[3]

On March 5, 2018, defendant was diagnosed with posttraumatic stress disorder (PTSD), which was consistent with the psychiatric symptoms described in the clinical assessment. Due to defendant's aggressive conduct after his previous surgery, the surgeon was refusing to perform the further operations defendant needed.

On June 5, 2018, defendant provided a letter from a doctor indicating that his medical team would need at least two years to complete all the procedures and surgeries defendant needed; furthermore, his mental health issues had delayed his treatment program. Defendant was given approximately one month's further continuance of sentencing.

"On information and belief, [defendant] has been quoted by his team of doctors as only having 10 years left to live, optimistically."

Based on these alleged facts, defense counsel asserted there was clear and convincing evidence of good cause to withdraw the plea. When defendant entered the plea he was unaware of the above physical and mental problems; he was " 'an entirely different person' " now. The PTSD diagnosis was a particular cause for concern, since

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[3] The purpose of some of the medications is not stated, and none of their alleged side effects are described.

that condition "would tend to interfere with [defendant's] thinking, memory, and ability to think rationally and work with his attorney productively."

Counsel asserted further that the complete list of defendant's medications, which had not been fully available to counsel before the entry of plea, showed that many of them "cause drowsiness or otherwise impact mood and cognition," and some "are intended to correct mental imbalances such as depression and bipolar disorder."[4]

According to counsel, "[h]ad [defendant] known of his latent physical and mental health diagnoses, he would have pursued different avenues with his defense. He would have been better able to assist counsel in preparing his defense, he would have been able to make informed, coherent choices about whether to resolve his case, and had he been in his right mind and aware of the reduced life expectancy and complex care needs he faces with his medical prognosis, he would have almost certainly chosen to go to trial and fight to avoid a prison sentence."

Defendant attached a supporting declaration, averring: "At the time of my change of plea on December 19, 2016, I was not aware that I would subsequently be diagnosed with a serious heart condition as well as need to receive treatment for mental health issues (PTSD) in connection with my heart condition. [¶] . . . At that time I was also not aware that I would only have approximately 10 years to live according to my doctors. [¶] . . . Had I known this, I would not have changed my plea on December 19, 2016 under the terms set forth in the plea agreement and would instead have insisted on either different terms or a trial by jury in these matters."

1.1.2 *The Opposition*

The People opposed the motion, asserting defendant had shown neither good cause to withdraw his plea nor prejudice from not being allowed to do so.

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[4] Counsel did not specify which medications could cause these problems or provide any supporting documentation.

1.1.3 *The Hearing on the Motion*

The trial court stated the following tentative ruling: "There is nothing in the motion which relates [defendant's declaration] back to the time of the entry of plea, or any of these things were [a]ffecting [defendant's] ability to understand, not only the offense, the rights which he gave up or the consequences of his plea, such that this would be a matter that would fall within [section] 1018, and withdraw[al] of the plea. [¶] In fact from everything else I [gather] there was no way for him or anyone else to know. So it does not provide, at least in my mind, the—as a trigger, types of things which would allow that."

Defense counsel argued that defendant's ongoing mental health issues, which were so serious that they prevented defendant from obtaining necessary medical care, were the weightiest ground to withdraw the plea.

The trial court responded that defendant had not provided any expert opinion that any condition described in the motion was present at the time of the plea. Thus, it appeared that the PTSD and defendant's "stabilizing medications" all postdated the plea "and is more related to the first surgery and the recovery from that surgery versus anything that has been related back to the time of the entry of plea."

The trial court adopted its tentative ruling and denied the motion.

1.2 *Analysis*

A guilty plea may be withdrawn at any time before judgment for good cause shown. (§ 1018.) " 'Good cause' means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment and must be shown by clear and convincing evidence." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.) The grant or denial of a motion to withdraw a plea is within the trial court's sound discretion and will be reversed only for abuse of discretion. (*Ibid.*) In reviewing the trial court's ruling, we must accept the court's factual findings if supported by substantial evidence. (*Ibid.*)

Here, substantial evidence supports the trial court's factual finding that defendant did not suffer from any condition at the time of his plea that could have overcome his exercise of free judgment. As the court observed, defendant put on no evidence that he had been diagnosed with PTSD or prescribed any medication alleged to be capable of interfering with his ability to think, reason, and cooperate with counsel until well after the entry of plea. (Furthermore, as noted, defendant's motion did not even identify which of his medications could have such effects.)

On appeal, defendant tries to make up for his failure of proof in several ways. All are unavailing.

To show he was suffering from conditions that could have overcome his free judgment when he entered his plea, defendant points to statements in the Tehama County Health Services Agency clinical assessment (prepared long after his plea) which indicate that he "was badly beaten with a baseball bat and left for dead after a sporting event in 2011; . . . was frequently abused as a child; suffers from ADHD; and had taken psychiatric medication as recently as 2011." According to the assessment form, these statements all stem from defendant's self-reporting, and nothing on the single page of the form attached to defendant's motion (said to be "[p]age 1 of 4") shows whether any attempt was made to verify them. But even if we assume them to be true, they do not meet defendant's burden. Defendant does not explain how events occurring no later than 2011 could affect his ability to enter a knowing, voluntary, and intelligent plea in December 2016; nor does he cite any authority holding that ADHD, without more, could do so.[5]

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[5] Defendant attempts to present evidence as to his alleged conditions and their effects by citing to materials that were not before the trial court and have not been proffered to this court by a motion to take new evidence or a request for judicial notice. We do not consider such materials. (See *In re K.P.* (2009) 175 Cal.App.4th 1, 5 [sources cited only in an appellate brief not evidence on appeal].)

Defendant also points to his substance abuse treatment, which began before he entered his plea. But defendant cites no authority holding that substance abuse in itself proves incapacity to enter a knowing, voluntary, and intelligent plea, and we know of none.

Lastly, defendant asks in a footnote: "Who knows what other evidence of [defendant's] medical and mental health conditions there would have been had a probation report been done prior to sentencing[?]" Such speculation is not grounds for reversal.

In any event, the transcript of defendant's plea agreement hearing itself constitutes substantial evidence that he entered his plea knowingly, voluntarily, and intelligently.

The trial court asked whether defendant had read and understood whatever he initialed on the written plea form; defendant said, "Yes." The court asked whether defendant had discussed any questions with counsel and whether counsel could answer them; defendant said, "Yes." The court asked if once defendant had an understanding of what was in the form, he had signed and dated the form; defendant said, "Yes, sir."

The trial court observed: "There's a part of the form that's a bit ambiguous and one that was not initialed. [¶] So let me ask first, are Counsel of the opinion that the plea could result in permanent exclusion from CalWORKs, food stamps, or general assistance?" Defendant said: "I refuse to sign then." Defense counsel added: "I don't think so. And so that's why we X'd it out, Your Honor."

The trial court stated that if this condition applied, it would not be ordered by the court but would be imposed by statute or regulation, and the court did not know whether Vehicle Code section 10851 had that effect. The point needed to be resolved now, because if the statute did require that condition and defendant refused to sign it, the court could not accept his plea.

The trial court noted another condition defendant had not initialed (paragraph 24), setting out his constitutional rights and his acknowledgment that entry of plea waived

them. Defendant asked if he could speak with the court. The court said he could not unless his counsel had discussed it with him first.

Defendant and counsel conferred off the record.

The trial court stated: "So, Mr. Cross, what we are going to assume going forward is, No. 1, that this is not an offense which would exclude you from benefits. And that if it were, it would be something that would allow you to withdraw from the plea agreement, okay?" Defendant said: "Okay." The court asked: "Make sense?" Defendant said: "Yes."

The trial court confirmed that defendant had now initialed and understood paragraph 24.

The trial court asked whether defendant understood the charges and enhancements he was pleading to and what it took to prove them, whether he had discussed potential defenses with counsel, and whether he understood that he was agreeing to a five-year stipulated term in state prison, "with other fines and fees imposed, and those consequences which you initialed." Defendant answered "Yes" to each question.

The trial court asked defendant whether anyone had tried to get him to enter his plea by promises or threats; defendant said, "No." The court asked: "And you are thinking clearly about the plea and the consequences; is that true?" Defendant said, "Yes."

The trial court then obtained defendant's no contest plea to each count and allegation in the plea agreement, and counsel's stipulation to the factual basis for the plea. Having done so, the court found the plea, admissions and waiver were "free and voluntary, with a knowing and intelligent waiver of rights."[6]

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[6] As defendant points out, the trial court failed to ask defendant whether he was taking any medication that might impair his ability to enter a knowing, voluntary, and intelligent plea. However, defendant does not cite any authority holding that this omission is

Unlike many plea hearings where a defendant simply answers "yes" or "no" when called on, here defendant not only gave appropriate responses but played an active and productive part in the proceedings. He objected to a supposed plea term and got the trial court to resolve the question by stating tentatively that the term did not apply, or that if it did he could withdraw the plea. He sought to engage the court directly on another point. He conferred with counsel in response to a question raised by the court. He then initialed a term he had left blank before. Only after all this did the court ask whether defendant understood the plea and whether he had been improperly induced to enter it. There is simply nothing in this record that suggests any impairment of defendant's will or intelligence.

Defendant has failed to show that the trial court abused its discretion by denying his motion to withdraw his plea.

2.0 Pretrial Mental Health Diversion

In the alternative, defendant asks us to remand the matter so the trial court can determine whether he is eligible for "pretrial diversion" due to a specified mental disorder under the recently enacted section 1001.36, which he argues is retroactive as to all cases not yet final. In support of his contention, defendant relies on the retroactivity rules of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299 (*Lara*). The Attorney General contends the language of the statute signals that it is prospective only. We agree.

Courts are divided as to whether section 1001.36 applies retroactively to cases not yet final on appeal under *Estrada* and *Lara*. (Compare *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted Dec. 27, 2018, S252220 (*Frahs*), *People v. Weir* (2019) 33 Cal.App.5th 868, review granted June 26, 2019, S255212, *People v. Weaver* (2019) 36

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enough to invalidate the court's finding, which was based on the court's observation of defendant's responses and demeanor throughout the hearing.

Cal.App.5th 1103, review granted Oct. 9, 2019, S257049, *People v. Burns* (2019) 38 Cal.App.5th 776, review granted Oct. 30, 2019, S257738, and *People v. Hughes* (2019) 39 Cal.App.5th 886, review granted Nov. 26, 2019, S258541, with *People v. Craine* (2019) 35 Cal.App.5th 744, 749, review granted Sept. 11, 2019, S256671 (*Craine*), *People v. Torres* (2019) 39 Cal.App.5th 849, petn. for review pending, petn. filed Oct. 11, 2019, S258491, and *People v. Khan* (2019) 41 Cal.App.5th 460.)[7] We conclude, in agreement with *Craine*, that the statute does not have retroactive effect as to cases, like this one, that had already reached the stage of conviction (whether by jury or by plea) before the statute's effective date.

Section 1001.36, effective June 27, 2018, provides that a trial court, "[o]n an accusatory pleading alleging the commission of a misdemeanor or felony offense" (with exclusions not relevant here), may grant "pretrial diversion" to a defendant who meets all of the requirements specified in the statute. (§ 1001.36, subd. (a).) These include, among others, "a mental disorder . . . including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or [PTSD]," as established by "a recent diagnosis by a qualified mental health expert" (§ 1001.36, subd. (b)(1)(A)), and proof to the court's satisfaction that the mental disorder "was a significant factor in the commission of the charged offense" or "substantially contributed to the defendant's involvement in the commission of the offense." (§ 1001.36, subd. (b)(1)(B).)

"Pretrial diversion" as used in the statute means "the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." (§ 1001.36, subd. (c).)

Defendant acknowledges that the date he entered his plea (Dec. 19, 2016) was well before the statute's effective date. He asserts, however, that the statute applies to

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[7] We may consider, as persuasive authority, the cases that have been granted review by our Supreme Court. (Cal. Rules of Court, rule 8.1115(e)(1).)

him because he was not sentenced until July 16, 2018 (after the statute's effective date), when his motion to withdraw the plea was denied. We disagree.

When a defendant enters a plea of guilty or no contest and the trial court accepts the plea, that constitutes "adjudication" for purposes of section 1001.36, even if sentencing occurs later. (*Craine, supra*, 35 Cal.App.5th at p. 755 [" 'adjudication' " is "shorthand for the adjudication of guilt or acquittal"], rev. granted; see *In re Harris* (1989) 49 Cal.3d 131, 135 [no distinction between adjudication of guilt based on plea and that predicated on trial on merits]; *People v. Allexy* (2012) 204 Cal.App.4th 1358, 1361, 1363 [under § 290.006, entry of no contest plea to felony child endangerment is "time of conviction," as distinct from "time of sentencing"].) Furthermore, if not for the multiple continuances granted due to defendant's medical problems, a factor extraneous to the adjudication of the case, his sentencing—i.e., the imposition of the five-year prison term that was a condition of his plea—would undoubtedly have occurred before section 1001.36 took effect.

Assuming we disagree with his claim that the date of sentencing should determine whether section 1001.36 applies, defendant argues in the alternative that we should give the statute retroactive effect as to him. He relies on *Frahs, supra,* 27 Cal.App.5th 784, review granted. However, for the reasons given in *Craine,* we conclude *Frahs* was wrongly decided and the statute does not apply retroactively to persons, like defendant, "who have already been found guilty of the crimes for which they were charged." (*Craine, supra,* 35 Cal.App.5th at p. 754, rev. granted.)

The *Frahs* court decided whether section 1001.36 is retroactive by applying the standard retroactivity rules of *Estrada* and *Lara*. In *Estrada,* the court held that when the Legislature amends a criminal statute so as to lessen the punishment for the offense, it must be inferred that the Legislature's intent was to apply the lighter penalty to all cases not yet final. (*Estrada, supra,* 63 Cal.2d at pp. 745, 748.) In *Lara,* the court extended this rule to situations in which new legislation, though not lessening punishment,

provides an " 'ameliorating benefit[]' " for accused persons or constitutes an " 'ameliorative change[] to the criminal law.' " (*Lara, supra,* 4 Cal.5th at pp. 308, 309.) Taking these rules together, *Frahs* found that section 1001.36 confers an " 'ameliorating benefit' " on a class of accused persons and therefore must be understood to work retroactively. (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev. granted.)[8]

The *Frahs* court rejected the Attorney General's argument that by expressly restricting its scope to the "postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication" (§ 1001.36, subd. (c)), the statute set a temporal limit on its retroactive effect. (*Frahs, supra,* 27 Cal.App.5th at p. 791, rev. granted.) The court reasoned: "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate." (*Ibid.*)[9] Concluding the issue could be resolved by applying *Estrada* and *Lara* to the plain language of the statute, the *Frahs* court denied the Attorney General's request for judicial

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[8] *Lara* summarizes *Estrada's* holding as follows: " 'The *Estrada* rule rests on *an inference that, in the absence of contrary indications,* a legislative body *ordinarily* intends for ameliorative changes to the criminal law to extend as broadly as possible . . . .' " (*Lara, supra,* 4 Cal.5th at p. 308; italics added.) *Lara* then concludes that neither the language of the initiative under consideration (Proposition 57) nor the ballot materials rebutted the inference that the initiative was intended to apply retroactively. (*Lara,* at p. 309.)

In quoting *Lara,* the *Frahs* court omits the qualifying language we have italicized. Thus, *Frahs* in effect mischaracterizes the *Estrada*/*Lara* rule as one that applies automatically to all legislation conferring an "ameliorating benefit" on persons charged with crimes, regardless of any "contrary indications" (*Lara, supra,* 4 Cal.5th at p. 308) in the legislation on its face or the legislative history. (*Frahs, supra,* 27 Cal.App.5th at p. 790, rev. granted.)

[9] *Frahs* did not address the first part of the statutory language quoted by the Attorney General (which is misstated as " ' "postponement *or* prosecution" ' "). (*Frahs, supra,* 27 Cal.App.5th at p. 791, italics added, rev. granted.)

notice of the statute's legislative history. (*Frahs*, *supra*, 27 Cal.App.5th at p. 789, fn. 2, rev. granted.)

In *Craine*, however, the court held that the *Frahs* analysis was flawed because it did not pay sufficient attention to how section 1001.36, subdivision (c), defines the timing of the "ameliorative benefit" it confers. In other words, *Frahs* did not properly consider either the phrase " 'postponement of prosecution' " or the phrase " 'until adjudication,' " instead relying only on a mechanical application of the *Estrada* and *Lara* rules.[10] (*Craine*, *supra*, 35 Cal.App.5th at pp. 754-756, rev. granted.)

As to "until adjudication" (§ 1001.36, subd. (c)), *Craine* pointed out that " '[t]he purpose of [diversion] programs [in the criminal process] is precisely to *avoid* the necessity of a trial.' [Citation.]" (*Craine*, *supra*, 35 Cal.App.5th at p. 755, rev. granted.) In other words, absent clear statutory language showing otherwise, it makes no sense to say that a defendant can be given the benefit of "pretrial diversion" after a case has already gone through trial to conviction (or its equivalent, a guilty or no contest plea). (*Id*. at pp. 755-756)

By the same token, the meaning of the phrase "the postponement of prosecution" (§ 1001.36, subd. (c)) depends on the normal usage of "prosecution" in the criminal process: " ' "[t]he proceeding by which a party charged with a public offense is accused and brought to trial and punishment. [Citations.]" ' " (*Craine*, *supra*, 35 Cal.App.5th at pp. 755-756, rev. granted.) "A prosecution 'commences when the indictment or information is filed in the superior court and normally continues until . . . the accused is "brought to trial and punishment" or is acquitted.' " (*Id.* at p. 756.)

Therefore, "[p]ursuant to the Legislature's own terminology, pretrial diversion is literally and functionally impossible once a defendant has been tried, found guilty, and

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[10] See footnote 8, *ante*.

sentenced.[11] Upon reaching this point of 'adjudication,' the 'prosecution' is over and there is nothing left to postpone." (*Craine, supra*, 35 Cal.App.5th at p. 756, rev. granted.)

According to *Craine*, *Lara* is distinguishable because the ameliorative benefit discussed there (the initial processing of accused juveniles in juvenile court, and trial in adult court only upon transfer) did not create a temporal bar to retroactive relief, as does section 1001.36. (*Craine, supra*, 35 Cal.App.5th at pp. 756-757, rev. granted.)

Craine also examines the legislative history of section 1001.36 (which *Frahs* refused to consider) and finds that it points to the same conclusion. The history makes clear that the statute was intended to make it possible to use early intervention wherever possible, partly " 'to avoid unnecessary and unproductive costs of trial and incarceration.' " (*Craine, supra*, 35 Cal.App.5th at pp. 758-759, italics omitted [quoting Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, pp. 2-3], rev. granted.)

As *Craine* points out: "Early intervention cannot be achieved after a defendant is tried, convicted, and sentenced. The costs of trial and incarceration have already been incurred. Moreover, because mental health diversion is generally only available for less serious offenses, the reality is many defendants would already be eligible for parole or some other form of supervised release by the time their cases were remanded for further proceedings. Since mental health services are already available to parolees . . . , it is hard to imagine the Legislature intended for additional court resources and public funds

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11 We note that the court in *Craine* had no occasion to consider a situation like the one presented in our case, where the trial court accepted defendant's plea (the equivalent of conviction) but then was forced to put off imposition of sentence for a long time due to the extraneous factor of defendant's medical problems. As noted previously, defendant's entry of plea included a stipulated five-year state prison sentence.

to be expended on 'pretrial diversion' assessments at such a late juncture." (*Craine, supra,* 35 Cal.App.5th at p. 759, fn. omitted, rev. granted.)

The structure of the relief provided by the statute also indicates that the Legislature intended to grant such relief only prospectively. In addition to the precise definition of "pretrial diversion" found in section 1001.36, subdivision (c), which we have already discussed, we note the following:

The period allowed for pretrial diversion is limited to a maximum of two years. (§ 1001.36, subd. (c)(3).) The defendant must prove he has a qualifying mental disorder that would respond to treatment; this proof must include "a recent diagnosis by a qualified mental health expert" (what constitutes "recent" is undefined) who may rely on "any . . . relevant evidence" including examination of the defendant, the defendant's medical records, and arrest reports, inter alia. (§ 1001.36, subd. (b)(1)(A), (C).) Once the defendant has met this burden, the trial court must determine whether the defendant's mental disorder was "a significant factor in the commission of the charged offense" by reviewing "any relevant and credible evidence," including all of the evidence considered by the mental health expert and more. (§ 1001.36, subd. (b)(1)(B).) At the end of the two-year diversion period, if the defendant has "performed satisfactorily" according to specified criteria, the court "shall dismiss the . . . criminal charges that were the subject of the criminal proceedings at the time of the initial diversion" and the defendant's record shall be expunged. (§ 1001.36, subd. (e).)

It would greatly strain scarce judicial resources to extend this complex scheme to persons who have already gone through the criminal process to the point of conviction. When added to the "contrary indications" (*Lara, supra,* 4 Cal.5th at p. 308) contained in the statutory definition of "pretrial diversion" and the legislative history, this consideration compels the conclusion that section 1001.36 was not intended to have retroactive application.

For all the reasons stated in *Craine*, we disagree with *Frahs* and find that "pretrial diversion" under section 1001.36 is not available to defendant because he has already been tried, convicted, and sentenced.

DISPOSITION

The judgment is affirmed.

/s/
Butz, J.

I concur:

/s/
Hull, J.

RAYE, P. J., Dissenting.

On May 23, 2017, defendant pleaded no contest to misdemeanor identity theft in return for dismissal of other charges and a term of imprisonment that would run concurrently with a stipulated state prison term for vehicle theft imposed in a previously adjudicated case. Sentencing was delayed to address various coronary and mental health issues, and on July 9, 2018, defendant filed a motion to withdraw his plea in the earlier case. On July 16, 2018, the trial court denied the motion and imposed the stipulated sentences negotiated in both cases.

Effective June 27, 2018, the Legislature created a diversion program for defendants with diagnosed and qualifying mental disorders such as schizophrenia, bipolar disorder, and posttraumatic stress disorder. (Pen. Code, § 1001.36.) Having failed in his effort to withdraw his plea, defendant now seeks a remand of this matter to the trial court for consideration of diversion under Penal Code section 1001.36. There is reason to doubt that the trial court would grant such a request on the merits, but the majority concludes he is not even entitled to try; the statute operates prospectively only and thus the trial court is without authority to consider such a request. I respectfully disagree.

The majority's position has an intuitive appeal. How can a pretrial diversion program be applied posttrial after defendant has been sentenced? That is the thrust of their argument, restated in various permutations, always with "pretrial diversion" enclosed in scare quotes. Perhaps the majority is correct. Certainly, the legislative scheme as expressed in the statute's language contemplates diversion prior to adjudication. Adjudication of a criminal case traditionally means a finding of guilt or acquittal, although *People v. Craine* (2019) 35 Cal.App.5th 744, review granted September 11, 2019, S256671, suggested an adjudication is not complete until sentencing. There are reasons, cost savings among them, to divert these cases prior to adjudication. It could be plausibly argued that as a budget trailer bill, Assembly Bill

No. 1810 (2017-2018 Reg. Sess.) was primarily concerned with fiscal matters. Fiscal savings are best achieved when cases are diverted before trial.

But acknowledgement that cost savings were a factor in the Legislature's passage of mental health diversion does not control the question of whether the measure should be applied retroactively to cases that are not final.[1] The majority imagines huge numbers of cases like defendant's where adjudication occurred prior to the measure's effective date but sentencing occurred thereafter. This causes them to posit "[i]t would greatly strain scarce judicial resources to extend this complex scheme to persons who have already gone through the criminal process . . . ." (Maj. opn. *ante*, at p. 17.) The record is silent on this point but it is likely that the number of cases like defendant's is small. Judicial resources will not be strained to handle them.

In re Estrada (1965) 63 Cal.2d 740 (*Estrada*) teaches that "[a] legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance." (*Id*. at p. 745.)

The *Estrada* rule is implicated "even if the new legislation merely 'ameliorate[s] the *possible* punishment for a class of persons.' " (*People v. Buycks* (2018) 5 Cal.5th 857, 883, fn. 8.) Where the rule is implicated, it applies "to every case to which it

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[1] The statement of purpose is set forth in the opening paragraphs of the legislation: "The purpose of this chapter is to promote all of the following: [¶] (a) Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. [¶] (b) Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. [¶] (c) Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders." (Stats. 2018, ch. 34, § 24.)

constitutionally could apply . . . provided the judgment convicting the defendant of the act is not final." (*Estrada, supra*, 63 Cal.2d at p. 745.)

The majority does not deny that Assembly Bill No. 1810 ameliorates the punishment for a class, consisting of individuals with the mental disorders described in the legislation. There may be sound reasons to deny a particular defendant the ameliorative benefits of mental health diversion. There is no sound policy or budgetary reason to deny such benefits to the small class of defendants whose cases remain pending in the Court of Appeal.

I therefore join with the Fourth District, Division Three, in *People v. Frahs* (2018) 27 Cal.App.5th 784, review granted December 27, 2018, S252220, and multiple other courts in concluding that defendant, whose sentence was imposed after the effective date of Penal Code section 1001.36 can properly be the subject of mental health diversion under the statute.

This is not an easy case. The Supreme Court will ultimately rule and in the process provide clearer guidance on when criminal sentencing statutes must be applied retroactively. Their guidance may diverge from the thoughts expressed here. Nonetheless, based on my current understanding of the Supreme Court's thoughts on the subject, I believe the judgment should be conditionally reversed and the cause remanded to the superior court with directions to conduct a diversion eligibility hearing, as discussed within this opinion, no later than 90 days from the filing of the remittitur. Defendant would not be assured of diversion but would be granted his day in court to assert his case.

/s/
RAYE, P. J.